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THE TERRORIST AS A BELLIGERENT UNDER INTERNATIONAL LAW

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

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April 1987

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by Captain Richard B. Jackson

ABSTRACT: This thesis examines the status of terrorists captured during a military deployment of forces against a terrorist threat. The application of international law to captured terrorists raises questions of procedure and policy. In addition, the definitions and norms of conduct in warfare are difficult to apply to the actions of terrorists. Alternatives to prisoner of war status, in the context of the law of war, peacetime international law, and domestic law, offer little hope of obtaining justice from terrorists for their transgressions. This thesis concludes that the initial application of prisoner of war status to terorists should become a matter of U.S. policy, and that the terrorist should continue to be treated as a prisoner of war until such time as he has been shown to have violated the norms of conduct during war, at which time he should be prosecuted for his crimes.

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I. INTRODUCTION

A. TERRORIST INCIDENTS

International terrorism has increased in frequency and savagery over the last several years. From 1970 to 1984 over 23,000 domestic and international terrorist incidents occurred, 41,000 individuals were killed, 24,000 people were wounded, and over one billion dollars in property damage was inflicted.1 In 1985, alone, there were 438 seperate terrorist attacks throughout the world recorded by the Rand Corporation Chronology, and over one quarter of these were against Americans.2 From 1980 to 1985 the number of terrorist incidents increased at a rate of more than 17 percent a year. In fact, since 1972, a watershed year for terrorism in which numerous hijackings and the Munich massacre took place, the number of such incidents has increased fourfold.

At the same time terrorism is growing bloodier. Each year during the 1980's the number of incidents involving fatalities has increased. Terrorists have also increased the number of people killed in each incident with large-scale indiscriminate attacks.3

International terrorism is a "distinct and significant new mode of armed conflict."4 Terrorists have adopted the concept of total warfare - they recognize no civilian noncombatants. This widening range of terrorist targets and the resulting narrowing of the category of innocent bystanders parallels what some scholars have called "the 20th Century concept of

total war."5 Allowed to go unchecked, terrorism threatens to blur any moral or legal distinctions between justified and unjustified uses of force. In addition, it is a mode of conflict that will increasingly demand the use of military force. Unlike traditional guerrilla conflicts, the pattern of terrorist campaigns is not likely to allow the United States government much choice in deciding whether to become involved, once America and its institutions become the targets of terrorism.6

Americans have increasingly been the focus of terrorist attacks, solely because they are Americans. American citizens and facilities are the most frequent targets in international terrorism, accounting for 29 percent of all incidents.7 The hijackers of TWA Flight 847 singled out a United States Navy diver for execution, and segregated the Americans from other passengers for further action. The Achille Lauro hijackers singled out those who carried American passports for segregation and the helpless Leon Klinghoffer for senseless murder. No American can forget the bombing of the Marine Barracks in Lebanon which resulted in the death of 241 marines.

B. U.S. POLICY

To many Americans terrorism became war on October 23rd 1983.8 It was as a direct result of this attack, and the perception that not enough was being done to combat terrorism, that President Reagan signed National Security Decision Directive 138 on 3 April 1984, detailing U.S. counterterrorist policy.9 Although the

document itself remains classified, former assistant to the President for National Security Affairs, Robert McFarlane, suggested at the Defense Strategy Forum on 25 March 1985 that it includes the following elements:

> - The practice of terrorism under all circumstances is a threat to the national security of the United States.
>
> - The practice of international terrorism must be resisted by all legal means.
>
> - State-sponsored terrorism consists of acts hostile to the United States and global security and must be resisted by all legal means.
>
> - The United States has a responsibility to take protective measures whenever there is evidence that terrorism is about to be committed.
>
> - The threat of terrorism constitutes a form of aggression and justifies self-defense.10

In a speech to the American Bar Association in Washington, D.C., on 8 July 1985, the President declared, "The American people are not - I repeat, not - going to tolerate intimidation, terror, and outright acts of war against this nation and its people."11

To clarify the implementation of this virtual declaration of war by the President, the Secretary of State detailed the specific responses to terrorism contemplated by the U.S. government in a speech to the Low-Intensity Warfare Conference at the National Defense University in Washington, D.C., on 15 January, 1986. Secretary Schultz included the military option as an integral part of our response to what he called the "ambiguous warfare" of terrrorism:

> We should use our military power only if the stakes justify it, if other means are not available, and then only in a manner appropriate to a clear objective. But we cannot opt out of every contest. We cannot wait for absolute certainty and clarity. If we do, the world's future will be determined by those who are the most brutal, the most unscrupulous, and the most hostile to everything we believe in...just as we turned to our men and women in uniform when new conventional and nuclear threats emerged, we are turning to [them] now for the new weapons, new doctrines, and new tactics that this new method of warfare requires.12

The applicatiion of military force to the terrorist threat presents a challenge to "use the law to preserve civilized order, not to shield those who would wage war against."13 But current international legal principles and concepts are not readily applicable to terrorist acts. Secretary Schultz has lamented this blurring of distinctions and the difficulty of applying the "rules of the game" to ambiguous warfare: "Terrorists do not generally abide by the Geneva Conventions. They place a premium on the defenselessness and helplessness of their victims. The more heinous the crime, the more attention terrorists attract to their cause."14 Just because the "ends justify the means" for the terrorist, the law need not be an impediment to employing counterterrorist warfare.

C. TERRORISTS AND INTERNATIONAL LAW

International law, and specifically the law of war, can be used to define the parameters for dealing

with captured terrorists, once the decision is made to employ military force. Soldiers deployed in combat need simple, practical, and realistic rules and methods for the treatment of combatants and prisoners. Commanders need realistic rules of engagement and expedited procedures for the treatment of prisoners in order to best accomplish the mission. Both of these concerns can be addressed by applying the terms and conditions of the law of land warfare, as the American soldier has been taught, to all suspected combatants on the field of battle.

These same rules may be applied to terrorists once the military conflict is over. An Article 5 Tribunal can be used to determine whether the alleged terrorist can be considered a combatant, and deserves the application of "belligerent privilege." The criteria for determining this privilege should include the definition of lawful combatant recognized under international law and examine the issue of state sponsorship of the terrrorist.

If the terrorist attains combatant status, he can still be tried for the commission of war crimes against protected persons. Such prosecution may be undertaken in either the domestic or international arena, using long-established precedents in the law of war. And the terrorist who attains prisoner of war status may be subsequently released or repatriated - depending on the length of the conflict, and the need for reciprocal treatment for captured U.S. combatants.

Alternatives to prisoner of war status have been widely discussed in the current debate on the treatment of terrorism.15 Jurisdiction could be ceded to local

authorities, after the rescue of Americans is accomplished in a foreign country, or the terrorist threat has been neutralized. A "universal crime," akin to the long-recognized crime of piracy, could be developed to punish terrrorists as internationally recognized criminals. Or the recently passed domestic legislation,16 which applies criminal law extraterritorially to terrorist acts against Americans abroad, may be used to extend the long arm of U.S. law to terrorists captured in force deployments overseas.

The clash of international law and domestic law in this area presents a dilemma for policy makers in determining the status of terrorists captured by the use of military force abroad - is the terrorist a lawful combatant, a war criminal or a common criminal? And which theory best serves U.S. interests? The answer lies in a mixture of law and policy, applied over the wide spectrum of terrorist activities. U.S. policy, and the perception of that policy domestically and around the world, are best served by applying the humanitarian aspects of the law of armed conflict, until terrorist actions unequivocably eliminate any application of the law of war.

Before discussing the status of captured terrorists under international law, however, it is essential to resolve two seperate preliminary issues - the definition of terrorism, or the terrorist; and whether the application of military force abroad against terrorists, with or without the consent of the foreign country concerned, consists of an "international armed conflict," in the meaning given to it by the Geneva Conventions.

II. DEFINITION OF TERRORISM

A. MORAL STANDARDS APPLIED TO TERRORISTS

"One man's freeedom fighter is another man's terrorist." - author unknown

This cliche is simplistic and inappropriately applied to the problem of applying a legal regime to terrorist actions. It assumes that there is no moral dimension to warfare, and there are no distinctions between legitimate targets and indiscriminate murder. However, any discussion of the idea of just war, and the nearly opposite concept of total warfare alluded to above, is beyond the scope of this paper.17 Therefore, it will be assumed that war can and should be regulated and individuals will be held accountable for their actions, no matter what their motives.18 As the United Nations Secretary General has stated:

> At all times in history mankind has recognized the unavoidable necessity of repressing some forms of violence, which otherwise would threaten the very existence of society as well as that of man himself. There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.19

If motives were to be considered in applying the definition of terrorism, the terrorist would be judged on the justice of a particular cause, rather than by the legitimacy of his tactics and targets. The

pejorative term "terrorist" has been applied indiscriminately throughout the world to attach a stigma to guerrillas and common criminals, alike. The Cubans and Soviets have used the term "terrorist" to describe both the "contras" and the "mujaheddin, respectively," in their attempts to free their respective countries from communist oppression.20 The definition of terrorism can only be divorced from purely political considerations by defining terrorist acts in terms of the tactics and targets which the terrorist uses.

B. BROAD DEFINITION OF TERRORISM

Michael Veuthey, a French author noted for his expertise in clandestine warfare and humanitarian law, defined terrorism as "the excessive use of violence by a State or by an armed political grouping, having the purpose to inspire the adversary or other people with anxiety, fear or even a state of submissiveness."21 This definition is difficult to apply because of the term "excessive" violence. Another proposed definition is "the threat or use of violence by private persons for political ends, where the conduct itself or its political objectives are international in scope."22 But this latter definition makes it impossible for a jurist (let alone an infantryman in the midst of combat) to define terrorism without reference to the underlying causes, or the political landscape. The terrorist cannot be defined, under this method, without examining the political objectives, or motives, of the terrorist.

These broader definitions can be contrasted with the following definitions, which concentrate on the terrorist actions themselves, rather than the motivations of the terrorist. Terrorism was defined, as early as 1962, by the South American jurist Eduardo Jimenez Arechaga as acts that in themselves may be classic forms of crime - murder, arson, bombing, kidnapping - but that differ from classic crimes in that they are executed "with the deliberate intention of causing panic, disorder, and terror within an organized society."23 The Israeli Ambassador to the United Nations, Benjamin Netanyahu, has defined terrorism as "the deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends."24 1st Circuit Judge Irving Kaufman, when asked to define terrorism for the ABA Symposium on Terrorism, in April 1986, defined terrorism as "political violence that lies wholely outside of accepted methods of warfare."25

C. THE MOST SUITABLE DEFINITION

The best definition, and most succinct, is that of Judge Kaufman. It includes both the illegitmate civilian targets of Ambassador Netanyahu's definition, and military targets which are attacked using unacceptable methods of warfare (like a car or truck bomb which fails to identify itself as the weapon of a combatant, or a terrorist who infiltrates as a civilian, without identifying himself as a combatant before attacking).26 This definition also refers to the political nature of terrorist warfare, to

distinguish it from mere criminal activity which has no political component. The Judge's definition allows nihilists and anarchists, who have no clear-cut political agenda and are not targeting Americans for political ends, to be dealt with by local police as common criminals. Judge Kaufman defines the phenomena in terms that can be easily applied both on the battlefield and in subsequent criminal trials - in terms of illegal tactics and illegitimate targets under the law of war.

Under this definition, in the context of armed conflict, the terrorist enemy can be defined to allow soldiers to identify combatants and legitimate targets. A legitimate target for U.S. soldiers can be defined in rules of engagement27 as anyone committing a belligerent act against the U.S. or its citizens anywhere in the world, anyone planning to execute such an act, or anyone providing any sort of logistical, intelligence, or operational support to terrorists. To the soldier on the battlefield anyone committing a belligerent act is then assumed to be a combatant. If captured, terrorists can then be dealt with under the laws of war.

III. INTERNATIONAL ARMED CONFLICT

The other preliminary issue which governs the application of international law to captured terrorists is the requirement that "international armed conflict" take place before the laws of war apply. The Geneva Conventions apply "to all cases of declared war or of any other armed conflict which may arise between two or

more of the High Contracting Parties, even if the state of war is not recognized by one of them."28 Is the use of armed military force against terrorists in a third country, with or without their consent, an "international armed conflict" under the Geneva Conventions?

A. COMMENCEMENT OF HOSTILITIES BETWEEN STATES

The three accepted ways of commencing hostilities are an unconditional declaration of war, an ultimatum with a conditional declaration of war, and the commencement of armed attack, or hostile acts of force.29 It seems clear that an "international armed conflict" exists if the United States attacks a group of state-supported terrorists in the supporting state.

President Reagan essentially made a conditional declaration of war in his July 1985 speech on "The New Network of Terrorist States," "And we're especially not going to tolerate these attacks from outlaw states run by the strangest collection of misfits, looney tunes, and squalid criminals since the advent of the Third Reich."30 Although traditional international law requires that a written ultimatum be formally issued to the country involved,31 the message to Colonel Gadhafi was unequivocable. In the age of instant communications through the mass media, it is clear that the Libyans knew the consequences of their continued support for terrorist acts, and the requisite conditions were found before the April 1986 attack on Libya.

The attack on Libya can be labeled an international armed conflict because two seperate states were involved and Libya committed an act of aggression, in violation of the standards set by United Nations General Resolution 3314 on aggression by "sending . . . armed bands . . . which [carried] out acts of armed force against another state."32 There is little dispute that an international armed conflict exists when the United States is involved in retaliation against another nation for terrorist acts supported directly by that foreign government.33

B. TERRORISTS WITHOUT GOVERNMENT SUPPORT

The more difficult application of the definition comes when U.S. armed forces are employed in a third country, with or without their permission, to combat terrorists who receive no identifiable state support. Under the definition of international armed conflict accepted as customary international law, and the definition of aggression expressed in United Nations General Assembly Resolution 3314 it is clear that the deployment of an armed force to occupy the territory of another state, however temporarily, without their permission, is an act of war against the occupied state, thus causing the application of the Geneva Conventions to combatants of both nations and all state-supported terrorists.34

But international law does not provide an easy answer to the application of the definition of "international armed conflict" to stateless

individuals, or nationals of another state, not a party to the anti-terrorist action.

> War is a contention between states. A contention may arise between the armed forces of a state and a body of armed individuals, but this is not a war . . . nor is a contention with insurgents or with pirates a war.35

International law governing armed conflict is generally intended to govern only the conduct between states. Although the conflict could be characterized as "international," since the terrorist targets are presumably nationals of another state, 36 there is a serious question whether the anti-terrorist action rises to level of an "armed conflict," as that term is meant to be applied in the Geneva Conventions.37

C. ASSUME INTERNATIONAL ARMED CONFLICT

The solution to this dilemma lies in accepting the laws which govern warfare between states as customary international law, to be applied by analagy to the deployment of armed force against terrorists who have no identifiable state support. The justification for this approach is both practical and humanitarian. As Jean Pictet stated in his Commentary, "It must not be forgotten that the Conventions have been drawn up to protect individuals, and not to serve state interests."38 It has also generally been U.S. policy to apply the laws of war, applicable to international armed conflicts, to all conflicts, even "essentially civil conflicts" (this was true of the Lieber Code

applied during the Civil War, and the law of war as it was applied in Vietnam).39

For the American serviceman, and his commander, application of the law of war in anti-terrorist operations allows them to apply a single, well-known body of law to operations, without causing them to pause in mid-stream and decide whether the action they are engaged in is an "international armed conflict," involving nationals of the occupied state, state-supported terrorists, or stateless terrorists. Any time military force "deployed for combat" is applied in another country, the United States has entered the arena of international law. The law applied will then coincide with the definition of terrorism posited by Judge Kaufman, allowing application of a well-developed body of law to the difficult issue of the status of captured terrorists - and the concommitant issue of how to properly try and punish these international criminals, once removed fron the battlefield.

IV. INITIAL TREATMENT OF TERRORISTS UPON CAPTURE

A. ARTICLE 5 OF THE POW CONVENTION

Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War(GPW), 19 August 1949, provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the catagories enumerated in Article

> 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.40

Protocol I to the Geneva Conventions, signed in 1977 (but not ratified by the United States)41, provides in Article 45 that any person who "claims to have prisoner of war status, or appears to be entitled to such status" shall maintain such status until a competent tribunal has determined whether they are entitled to prisoner of war protections.42 Though uncertain in its application as customary international law, this provision helps to strengthen the proposition that prisoner of war status is a presumptive status43, which favors the application of humanitarian principles during initial contact with those who are out of combat by reason of capture or surrender.

B. U.S. POLICY

United States policy provides for giving protected status, initially, to all combatants and suspected combatants. Article 5 is to be applied to any person not "appearing to be entitled to prisoner-of-war status who has committed a belligerent act . . . and who asserts that he is entitled to treatment as a prisoner of war," or anyone about whom any doubt as to status exists, until such time as a competent tribunal decides their status.44 Army Regulation 190-8, which provides for "Enemy Prisoners of War Administration, Employment, and Compensation," requires that all persons "captured, interned, or otherwise held in U.S. Army custody will

be given humanitarian care and treatment from the moment of custody . . ." The policy is to be applied equally to all persons in custody, whether they are "enemy prisoners of war, strictly detained persons, or in any other category," or they are "known or suspected of having committed serious offense(sic) that could be characterized as war crimes."45

During Operation Urgent Fury, conducted in October 1983 in Grenada, the policy to grant a presumptive status as prisoners of war was applied liberally to Cuban military and Grenadan People's Army personnel, civilian laborers who accompanied the cuban Armed Forces, and suspected members of all three groups.46 "The United States historically has employed a liberal interpretation in bestowing EPW[prisoner of war] status and protection, again in part to insure that U.S. personnel captured by other nations will receive prisoners of war status and protection under the broadest of circumstances."47 This broad application of the policy not only allowed for fair and humane treatment of those rendered hors de combat during the operation, it also precluded the Cubans from "exploiting the prisoner of war issue" as a propaganda ploy against the United States government.48

C. PRACTICAL AND HUMANITARIAN CONCERNS

Other countries have given prisoner of war status presumptively to those who have been captured, until a competent tribunal has had the opportunity to make a status determination. In Military Prosecutor v. Omar

Mahmud Kassem and Others the Israeli Supreme Court held that, under Article 5:

> in case of doubt as to whether the persons who have committed belligerent acts and fallen into the hands of the enemy are prisoners of war, they shall enjoy the protection of the Convention until their status is determined by a competent Tribunal. The intention of this article is to withold from military commanders the power to determine whether persons captured in combat operations are prisoners of war, and to vest that power in a court in which the question can be decided according to accepted principles of law and justice.49

Article 5 provides for both practical and humanitarian concerns. One of the purposes of this provision is to prevent exceptions from "infringing on the fundamental principles" of the Convention.50 Article 5 prevents the Detaining Power from taking advantage of recently detained prisoners, prisoners who fall into enemy hands by surrender, deserters, or those who have lost their identity cards.51 Even more fundamentally, it is intended to protect those who are rendered hors de combat, by virtue of having laid down their arms, and detention of prisoners of war is to be distinguished from punishment for crimes.52 The humane and orderly treatment of prisoners of war allows for the application of both humanitarian concerns for those no longer in combat and practical concerns of the soldier on the ground.

The application of prisoner of war status to all combatants and suspected combatants has the added advantage of providing a "bright line" test which can be easily applied by the infantryman in combat and the

military policeman who must handle the prisoners of war as they are moved farther back from the front lines. As a practical rule for soldiers it will also serve to prevent war crimes and save scarce resources. Soldiers who are told to handle all combatants and suspected combatants as "protected persons," or prisoners of war, will not be tempted to practice illegal battlefield interrogation with the use of torture, or summarily execute terrorists who have commmitted heinous crimes.

The teaching of human rights law before deployment, and the application of it at this early stage may mean:

> the difference between ruthless killing of a soldier who surrenders and his being disarmed and evacuated to the rear with a minimum of harm . . .The choice depends largely on the extent to which a few basic humanitarian rules are known to people who, for an unspecified length of time, suddenly find themselves with the almost absolute power over other, defenseless, human beings. The temptation to abuse the power, especially for the individuals who have never had power is strong . . . To have a clear chance of being effective, dissemination must be developed before an armed conflict breaks out.53

With the possible exception of the need for the soldier and the commander to record circumstances of capture for future resolution of status, the initial assumption of prisoner of war status also frees the front-line soldiers to continue the fight and allow the rear echelons to resolve issues of status. Initial treatment of captured belligerents under the Prisoner of War Convention is only a convention - a practical means of getting captured personnel off the battlefield and out of the soldier's way in the most humane and expeditious manner possible. The proper forum for

deciding the status of captured terrorists is the Article 5 "tribunal."

V. USE OF THE ARTICLE 5 TRIBUNAL

A. SOME DEFINE "TRIBUNAL" AS A JUDICIAL BODY

The "tribunal" described in the last sentence of Article 5 is left without further description in the Geneva Conventions of 1949. Pictet notes that the original description of the tribunal was as a "responsible authority," which was replaced by "military tribunal" in later drafts, to avoid arbitrary decisions made by the commander on the battlefield.54

> This suggestion was not unanimously accepted, however, as it was felt that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention. A further amendment was made to the [earlier] test stipulating that a decision regarding persons whose status was in doubt would be taken by a 'competent tribunal,' and not specifically a military tribunal.55

As indicated in the Kassem case, the last line in Pictet's commentary has been interpreted by the Israeli court to mean that a "competent" Article 5 tribunal is one devoid of military power. In that case, the Israeli Supreme Court determined that it had jurisdiction to "classify the defendants as prisoners of war," as a competent civilian tribunal.56

The British Government established a "board of inquiry," under the British Manual for Courts Martial,

and the Army Act of 1955, to determine the status of belligerents in questionable cases.57 They chose to interpret Article 5 as requiring a "competent" judicial military tribunal.

B. U.S. POLICY ESTABLISHES AN ADMINISTRATIVE TRIBUNAL

U.S. Courts were presented with the issue of acting as a "competent tribunal," under the Geneva Conventions, in United States v. Morales, and decided in the Eastern District of New York in 1979, that the court was unable to make that determination without a clear armed conflict or declared war.58 Because the court did not get past the threshold issue of whether an armed conflict existed, however, they did not squarely face the issue of a "competent tribunal."

The adequacy of a military tribunal to determine lawful combatant status was challenged at the Supreme Court in Ex parte Quirins, dealing with several German saboteurs in 1942. The Quirin court found that the President could appoint a military commission to determine lawful belligerent status and try the agents as spies under Article 12 of the Articles of War [the precursor to our Uniform Code of Military Justice(UCMJ)].59

The authoritative U.S. interpretation of the Article 5 "tribunal" is that it only requires a military administrative body to determine status, rather than a civilian court, or military judicial tribunal.60 Paragraph 71c of The Law of Land Warfare, FM 27-10, states that a "competent tribunal" is a "board of not less than three officers acting according

to procedure as may be prescribed for tribunals of this nature."61

C. TRIBUNAL IN PRACTICE

The "prescribed procedure" was not developed, in legislation or otherwise, until the demands of the Vietnam war, where the problems of defining combatants assumed "Homeric proportions."62 As early as May 1966 the United States Army issued United States Military Assistance Command, Vietnam (MACV), Directive 20-5, on the determination of prisoner of war status.63 A military tribunal was established, consisting of three or more officers, one of which was required to be an attorney. The tribunal conducted a hearing with a specified procedure to determine by majority vote whether or not the individual was entitled to prisoner of war status. The individual was afforded the right to counsel, and given the right to confront witnesses against him, as well as the time and resources to present a defense. The detainee could testify, with the aid of an interpreter, or remain silent. The detainee also had the right to have the opinion of the tribunal reviewed by the commanding general, administratively, or have a rehearing ordered after legal review.64 These rights and procedures are equivalent to those given to the respondent in most military administrative hearings,65 and should be considered the minimum standards for the structure and composition of the Article 5 tribunal.

Separation of combatants and non-combatants, and the application of prisoner of war status to lawful combatants is a question of fact which must be determined by the tribunal, with facts which must be provided by the circumstances of capture. It is vitally important, especially in anti-terrorist warfare, for the commander and the capturing soldier to record all the circumstances of capture and include any intelligence gathered at or near the scene. The MACV Directive put the determination in perspective for the Vietnam War:

> e. Some persons obviously are prisoners of war; e.g., NVA or VietCong regulars taken into custody on the battlefield while they are engaged in open combat. Others obviously are not prisoners of war; e.g., civilians who are detained as suspects, found to be friendly, and released; or returnees who received favored treatment under the Chu Hoi [amnesty] program. In other cases entitlement to PW status may be doubtful. In doubtful cases the necessity for a determination of status by a tribunal may arise . . .66

The purpose of the tribunal is to determine, in cases where there is any doubt, whether the individual is entitled to prisoner of war status, under the provisions of Article 4, GPW. It applies to "cases of doubt as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4."67 The determination of the tribunal can be synthesized into a series of questions about the detainee:

- Has the detainee committed a hostile act?
- Is he a member of a lawful armed group?
- Is the detainee a lawful combatant?

VI. THE BELLIGERENT PRIVILEGE

A. SIGNIFICANCE

The individual entitled to the "belligerent privilege" is immune from criminal prosecution for "those warlike acts that do not violate the laws and customs of war, but that might otherwise be common crimes under municipal law."68 "The State is represented in active war by its contending army, and the laws of war justify the killing or disabling of the one army by those of the other in battle or in hostile operations."69 This was recognized in the famous Lieber Code of 1863, which governed U.S. armies in the field, and provided, "so soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."70 U. S. law has always held that killing during combat was not a cognizable offense if it was committed during active warfare.71

The question of whether belligerent status is to be afforded the detainee is "of the utmost signifigance."72 Once the individual is accorded the status of a belligerent, he is "bound by the obligations of the laws of war, and entitled to the rights which they confer." "The most important of these is the right, following capture, to be recognized as a prisoner of war, and to be treated accordingly."73

But in order to attain the "belligerent privilege," and the prisoner of war treatment which comes with it, the soldier must be found to be a lawful combatant under the rules prescribed by international law.

B. ARTICLE 4

Combatants are given prisoner of war status if they fall into catagories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following catagories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
> (a) that of being commanded by a person responsible for his subordinates.
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war;
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;
> (4) Persons who accompany the [forces]. . .
> (6) Inhabitants of a non-occupied territory who on the approach of the enemy

> spontaneously take up arms to resist the invading forces, without having had the time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.74

Most of the provisions of this article are straightforward. Members of the regular forces, those who accompany them, and those inhabitants who spontaneously rise up to resist the invader (the levee en mass) are all simple categories to place a detainee in, given clear facts. However, the "seeds of controversy"75 are planted in the requirements for "organized resistance movements."

C. IMPLIED CONDITIONS

In addition to the four requirements enumerated in Article 4, there are often added at least two "implied conditions" - being organized and belonging to a party to the conflict.76 The requirement for organization may be redundant with the requirement for commanders who are responsible for their organizations.77 However, the requirement that the resistance movement belong to a party to the conflict forces the group to show at least a de facto relationship with a state.78 In the Kassem case the Israeli Supreme Court found that the Popular Front for the Liberation of Palestine, to which the accused belonged, is not part of the Jordanian Army or in any way affiliated with the government (in fact, the court found that the government had attempted to prevent it from operating on its territory). The Court pointed out:

> The most basic condition for classification of combatants of irregular forces as prisoners of war is their belonging to a belligerent party. If they do not belong to a Government or State for which they fight, the combatants do not have the right to enjoy the status of prisoner upon capture.79

During the "Operation Peace for Galilee" incursion into Lebanon the Israeli Defense Force Judge Advocate General used the explicit, as well as the implicit requirements of Article 4 to justify Israel's refusal to grant prisoner of war status to Palestine Liberation Organization (PLO) personnel captured in Lebanon:

> - PLO personnel are not members of the armed forces of a state which is a party to the conflict.
> - they do not cumulatively fill all four conditions
> - many were dressed in civilian clothes, without any distinctive sign, recognizable at a distance.
> - the PLO does not conduct its operations in accordance with the laws and customs of war, being engaged in a persistant policy of indiscriminate attacks against the civilian populations of Israel and Lebanon, and against Jews and Israelis throughout the world.80

In the Israeli view, even if the PLO guerilllas should qualify as lawful combatants, by meeting the "other, incontrovertible prerequisites, they are combatants in a war between Israel and independent Arab countries. There is no war between Israel and the nonexisting Arab state of Palestine."81

A contrary opinion is offered by scholars who support the Palestinian view of the requirement for statehood.82 The implied condition that the resistance movement "belong to a Party to the conflict" does not mean the "subordination of the resistance movement to a state which is a party to the conflict or the dependence of such movement upon such a state."83 The Commentary, by Pictet, notes that a de facto relationship "may find experession merely by tacit agreement if the operations are such as to indicate clearly for which side the resistance organization is fighting."84

The requirement for statehood, or belonging to a Party to the conflict, is the most hotly debated issue confronting the ratification of the 1977 Protocols because it goes to the heart of most third-world countries' very existence - what Woodrow Wilson called "self-determination," and what the Protocol I termed the struggle of peoples against "colonial domination and alien occupation and against rascist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations . . ."85 This provision makes the resistance movements identified by these subjective criteria automatically a "party to the conflict," without requiring them to establish the objective criteria necessary to establish a "classic belligerency."86

D. DISTINGUISHING COMBATANTS IN GUERRILLA WARFARE

In the age of guerilla warfare the other, more stringent, requirements of Article 4 A(2) GPW are

unacceptable to proponents of that form of warfare. The Vietcong, for example, in accepting the Convention, made a reservation in which they stated that they would not recognize the four conditions of Article 4 A(2) "because these conditions are not appropriate for the cases of people's wars in the world today."87

> Of these requirements, (a) can readily be complied with by irregulars, members of resistance movements, and guerillas. For forces which rely on surprise, stealth, and concealment, (b) and (c) are difficult, and (d), conformity with the law of war, may be difficult or impossible for forces lacking facilities for the detention of prisoners of war taken by them.88

The Protocols of 1977, in an attempt to reconcile the concerns of organized resistance movements, proposed that the irregular forces receive combatant status, "even though he cannot distinguish himself," provided that he carry his arms openly (a) during each military engagement and (b) during each time he is visible to the adversary "while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."89 This proposal became one of the chief stumbling blocks over ratification of the Protocols by the United States and other Western countries.90

The purpose of Article 4 A(2) GPW is to take steps so that combatants can be easily recognized and distinguished from members of the enemy armed forces or from civilians, and insure compliance with the laws of war by these combatants.91 A combatant is required to declare himself so that the regular armed forces can

maintain a presumption that those who do not declare themselves are civilians and immune from attack under the laws of war.

> Guerilla activity and resistance activities by persons passing themselves off as civilians can readily change the presumption that a person not in uniform is a peaceful nonparticipant to a presumption that such an individual is or may be a combatant. To the extent that the line between peaceful civilians and combatants is blurred and a combatant can disguise himself, the protection of the fundamental human rights of peaceful civilians is imperiled.92

VII. APPLICATION OF THE BELLIGERENT PRIVILEGE TO TERRORISTS

The application of the belligerent privilege to terrorists depends upon several factors. Both the organization and the individual terrorist must be examined by an Article 5 tribunal to determine if the captured terrorist has met the conditions to obtain prisoner of war status.93 If the "implied conditions" of organization, and belonging to a Party to the conflict are to be applied to terrorist organizations, the organization itself must be analyzed to determine what, if any, state sponsorship is involved. If there is no state sponsorship, the "terrorist organization" must be examined to determine if it can attain the status of a "Party to the conflict," if it has sufficient organization and leadership to determine who is "responsible" for the actions of his subordinates, and if the organization itself manifests an agreement

to abide by the laws of war. The individual terrorist must be scrutinized to ascertain whether the detainee is a lawful combatant. The final question to be determined is whether the terrorist should be given lawful combatant status, because of the dangers that recognition of the belligerent privilege would bestow some sort of legitimacy upon the terrorist organization.

A. STATE SPONSORSHIP

Provable state sponsorship of terrorism, in the form of operational control, makes it easy to determine if the implied conditions of organization and being a party to the conflict are met. There is much more than the "tacit support" required by Pictet. In fact, since this issue becomes closely entwined with the requirement to have a commander, "responsible for his subordinates," the sponsoring state can be held responsible if the terrorist follows orders from above. This issue becomes much more difficult when the "state-sponsorship" takes the form of supplies, equipment, or intelligence, without operational control.

Does the logistical support, safe haven, training, and intelligence that the Soviet Union and other Warsaw Pact countries provide to terrorists like Abu Nidal qualify as a "de facto relationship between the resistance organization and the party to international law which is in a state of war" sufficient to establish the terrorist group as a Party to the conflict?94 Only if both the relationship between the Soviet bloc support and the action is affirmatively established (as

in the assasination attempt on the Pope95) and the United States is willing to effectively declare war by initiating an armed conflict against the supporting state or states. This scenario is highly unlikely, unless it is done in the limited manner in which the attack on Libya was conducted. In the latter situation it seems clear that state sponsorship by the country which we have initiated an armed attack against will establish the terrorist organization as an integral part of a "Party to the conflict."

B. TERRORIST ORGANIZATIONS PARTIES TO THE CONFLICT?

Without such state-sponsorship it is much more difficult for the terrorist organization to meet the requirements of the "implied condition" of being an organized party to the conflict. That determination requires two "conditions precedent": a political organization with the attributes of a governmental organization which is characteristic of a "classic belligerency," perhaps modified somewhat for the changed conditions of today's political panorama; and a military organization which has at least some of the characteristics which give meaning to the words "hierchy, discipline, and responsibility."96

The "classic belligerency" required the following conditions be met: the existence of a civil war, accompanied by general hostilities; rebel occupation and administration of a substantial part of the national territory; observence if the rules of warfare by the insurgents, acting under a reponsible authority; and the "practical necessity for third states to define

their attitude to the civil war."97 Some movements for national liberation, like the FLN in Algeria, attempted to establish the requirements for a belligerency, and gain some semblance of legitimacy, by "undertaking civil and criminal administration in competition with the established authorities."98 In the film, "The Battle for Algiers" the "officials" of the FLN are shown carrying out summary executions and marraige ceremonies, in an effort to bypass the French authorities.99 As this example illustrates, the classic definition of a belligerency has the potential for a great deal of modification, to reflect the origins of many of the independant states of the world.

As discussed above, Protocol I of 1977 greatly expanded the definition of a party to the conflict by giving those groups who are waging a "just war"100 recognition as international entities. But even the expansive definition of Article 1, Protocol I, is limited to political organizations with definable characteristics, which give them the status of an internationally recognizable entity.101 It is essential that some form of organization exist to sign treaties, or provide the point of contact to resolve grievances, or negotiate political solutions, like a repatriation of prisoners.

The organization must have received some degree of recognition,102 through regional organizations, the United Nations, or through seperate recognition of states.103 The only two "peoples" who appear to qualify under the Protocol I definition are the populations of Southern Africa and Palestine.104 This would severly limit the number of arguably terrorist

organizations which would receive recognition as an international entity to SWAPO, ANC, and the PLO.105

C. MILITARY ORGANIZATION REQUIRED

Both the Protocols and Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War emphasize the need for a military organization.106

> The Conference of Government Experts [negotiating Article 4] had generally agreed that the first condition preliminary to granting prisoner-of-war status to partisans was their forming a body having a military organization. The implication was that such an organization must have the principal characteristics found in armed forces throughout the world, particularly in regard to discipline, hierarchy, responsibility, and honour.107

The actual language of Article 4, laid out in detail above, requires that the "organized resistance movements" be "commanded by a person responsible for his subordinates." Article 43 of Protocol I contains a specific requirement that the "organized forces" be under a "command responsible . . . for the conduct of its subordinates." It also requires that the armed forces be "subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."108 This provision brings the Protocol definition in line with the intentions of the drafters of the original Geneva Convention, by equating the military structure of the "organized resistance movement" with that of regular forces.109

Both of these provisions make it clear that the organization in question must have a chain-of-command, like a military organization, and a method to discipline offenders, to insure compliance with the laws of war. Taken together with Articles 86 and 87 of Protocol I, detailing responsibilities of the commanders in acting to prevent violations of the laws of war, Article 43 eliminates the possibility for some sort of "anonymous collegial command structure."110

Only those resistance movements which bring the command structure and the disciplinary system in line to enforce the laws of war will be able to obtain the benefits of prisoner of war status for its members. An example of such an effort to establish a disciplinary system to conform to this requirement of the law of war can be seen in the "contra's" umbrella organization, recently established in Honduras and Nicaragua.111 Even though many terrorist groups adopt a military-style organization, there is rarely any type of disciplinary sanction to punish those who kill indiscriminately.112

The foregoing "organizational" requirements are the most difficult barriers which terrorist organizations face in attaining prisoner of war status for their members. Terrorist organizations, if they can be classified as viable political/military organizations with a revolutionary goal, are inevitably in the first phase of Maoist revolutionary warfare.113 Their structure is cellular, and their manner secretive.114 Many individual terrorists suffer an ambivalence toward authority, and an emotional detachment from the consequences of their actions.115

None of these characteristics is conducive to the type of organizational structure which must be established to attain international recognition as a seperate political entity, nor is it conducive to an efficient military organization.

D. TACTICAL NORMS OF CONDUCT

Even if the organization can obtain the organizational structure and political recognition necessary to obtain the belligerent privilege for its members, the tactics of terrorist organizations must conform to the requirements of the Geneva Conventions (or, at a minimum, the Protocols), in order for the individual terrorist to obtain prisoner of war status. The legal status of the individual combatant in terrorist warfare is dependent upon the degree of his acceptance of certain norms of conduct.

Even in a legitimate war, clandestine fighters are apt to be treated as unprivileged belligerents. The Lieber Code of 1863 provided that part-time soldiers who return to their homes or jobs, "divesting themselves of the character or appearance of soldiers," are not entitled to be treated as prisoners of war, "but shall be treated summarily as highway robbers or pirates."116

While the later Conventions do away with the unprivileged status of the intermittent or self-appointed fighter, "they still impose standards of overtness that a typical clandestine force cannot meet."117 In order to accomplish their mission they must work secretly, wear no uniform or distinguishing

sign, and withhold their identity prior to attack.118 The exigencies of warfare today, and in the recent past led to the modification of Article 4 A(2) proposed in Article 44 of the 1977 Protocol I.

Protocol I eliminates the criteria for wearing a "fixed distinctive insignia, recognizable at a distance" and replaces it with the requirement for the combatant to merely possess arms in the presence of the enemy to evidence his hostile intent; but this requirement bears a closer examination. These requirements in no way prohibit the combatant from "plunging into the population," once the engagement is over; it only requires that the distinguishing characteristics be employed during the atttack.119 And any hindrance of the terrorist mission must be balanced against the humanitarian requirements of the law of war.

The objectives of the original drafters of the requirements in Article 4 of the GPW were:

> (1) to protect members of the armed forces of the Occupying Power from treacheroous attacks by apparently harmless individuals, and
> (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.120

The elimination of any requirement for a distinctive insignia makes it almost impossible to distinguish the combatant from the civilian. Weapons, like removable insignia, are easily disposed of when the need arises; and how are the soldiers of the

Occupying Power to distinguish the "recent resistance fighter, identifiable only by the possession of the weapon, who, immediately upon finding himself in danger, has disposed of his weapon" and become one with the crowd, from the noncombatant, who must be protected from attack?121 In counter-terrorist actions this problem is even more acute, since terrorist targets are often non-combatants.

While many other requirements may be relaxed to obtain prisoner of war status for terrorists who are hors de combat, and therefore require some protection under the law of war, the criteria expressed in Article 4 A(2) of the GPW cannot be relaxed. The paramount humanitarian concern should be that expressed by the drafters above - for the non-combatants.

E. LAWFUL COMBATANTS MUST ABIDE BY THE LAWS OF WAR

Another requirement which cannot be relaxed for armed resistance groups is the requirement to abide by the laws of war. This criteria is listed in both Article 4 and the Protocol, and is the "essential provision which embraces all the others."122 "International law cannot, without completely undermining itself, confer privileged status on acts which so clearly run counter to it, whatever motives inspire those who commit them."123 The principle of reciprocity is an underlying tenet for application of the entire law of war regime.

> It would seem indisputable that if the members of organized resistance movements are to be permitted to claim the protection of

> the relevant laws and customs of war, they must, in turn, themselves comply with those laws and customs.124

With respect to terrorist warfare, therein lies the rub. The court in Kassem found that the Popular Front for the Liberation of Palestine does not conduct its operations in accordance with the laws and customs of war. The court said:

> The attack upon civilian objectives and the murder of civilians in the Mahane Yehuda Market in Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in the Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women, and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of international law, and according to the authorities quoted are crimes for which their perpetrators must pay the penalty. Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.125

In fact, this fits the very definition of terrorism that was adopted in the beginning of this paper as "political violence that lies wholely outside of accepted methods of warfare." So why even consider granting prisoner of war status to terrorists? Isn't it an exercise in futility?

VIII. SHOULD THE PRIVILEGE BE APPLIED TO TERRORISTS?

The status of terrorists as prisoners of war must be analyzed in terms of both the military and humanitarian interests served by conferring lawful

combatant status on the terrorist, and this must be balanced with the political efficacy of this approach.

A. HUMANITARIAN CONSIDERATIONS

Humanitarian considerations should be paramount in application of the law of war. The decision as to who enjoys prisoner of war treatment is an humanitarian problem.126 Alfred Rubin, Professor of International Law at the Fletcher School of Law and Diplomacy, and the 1981 Charles H. Stockton Professor of International Law at the Naval War College, posited in a paper delivered at a conference on the law of war at the Naval War College, "Terrorism and the Laws of War," that the humanitarian law of armed conflict needs to be applied to the reality of modern warfare against terrorists.

Professor Rubin cited two factors which cause the law to be applied asymmetrically between the terrorist and the defending government forces: the political labeling process allows the defending government to deny the terrorists' the belligerent privilege by defining the war as a non-international armed conflict, while the military forces of the defending government are able to assert special "police" privileges. The resulting situation "may be analogized to a military force composed entirely of a posse of ad hoc deputy sheriffs chasing criminals." This situation is clearly inconsistent with the "underlying evenhanded, humanitarian philosophy" of the law of armed conflict.127

The definition of armed conflicts for peoples fighting against colonial domination, alien occupation, and rascist regimes contained in Protocol I corrects the "asymmetry" by making it more difficult for the defending forces to avoid giving prisoner of war treatment to individuals because the organization to which they belong has not attained the classic status of a "belligerency."128 The decision as to whether the organization itself qualifies the terrorist combatant for prisoner of war status should be governed by the humanitarian concerns which militate toward allowing an individual terrorist to be considered a prisoner of war, so long as he conducts his operations in accordance with the laws of war.129

B. POW STATUS CONFERS NO POLITICAL STATUS

One of the most frequent criticisms of the application of prisoner of war status to terrorists is that the terrorist thereby attains some measure of legitimacy for his cause and his organization. "[G]overnments fear that any international rules establishing the combatant's privilege and prisoner of war status in internal armed conflicts would . . . enhance the perceived standing of the insurgents . . ."130 Established governments, like the French in Algeria, who went all through the Algerian war without officially accepting any form of belligerent status for the FLN, have been reluctant to give the belligerent privilege to terrorist combatants.131

A modern example of this dilemma is presented by the British experience in Northern Ireland. During the

early stages of the conflict, beginning in 1971, Irish Republican Army(IRA) members interned by the British were housed in compounds and "permitted to organize themselves like prisoners of war."132 In June of 1972 a "special actegory status" was introduced for any detainee or criminal sentenced to more than nine months imprisonment "who claimed political motivation and was accepted by a compound leader."133 The prisoners within the compound were given a great deal of autonomy, with a "commanding officer," who directed training for the members of the paramilitary organization. "Under these circumstances, special status looked like recognition by British authorities of some form of political status for terrorist offenders."134 The British reeaction to this problem was to phase out "special status" in 1976, and treat IRA members as criminals.135

Despite the fears of many governments, applying a less stringent standard to the terrorist organization, for the purpose of defining the individual's status as a prisoner of war, gives no political status to the organization itself. The law is clear that recognition of belligerent status does not imply any recognition of political status for any purpose besides the war.136 Protocol I makes this issue plain in Article 4, "The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict."137

C. PRACTICAL CONCERNS

While the decison to attribute to the terrorist organization the necessary structure to obtain prisoner of war status for its members is a humanitarian and political one, the question of which terrorist enjoys the individual status of combatant is governed by practical military and humanitarian concerns. Military forces must be able to distinguish the combatants from the civilians to avoid "treachery and perfidy" by the enemy and to avoid killing the unarmed civilian. By the same token, terrorists must be forced to follow the laws of war to avoid unnecessary suffering for combatants and non-combatants alike. In this way the promise of prisoner of war status can be offered as an incentive to "terrorists" to apply the law of war, and thereby become "freedom fighters."

IX. THE CONSEQUENCES OF POW STATUS

Conferring prisoner of war status on alleged terrorists engenders both rights and obligations, most of which are detailed in the specific articles of the Geneva Convention Relative to the Treatment of Prisoners of War, and Part III of Protocol I. The two dominant issues, however, are whether to try terrorists who have committed war crimes as "war criminals," and how long to hold the terrorist as a prisoner of war.

A. TRIAL OF TERRORISTS AS WAR CRIMINALS

Terrorists who have committed crimes against the

law of war should be tried as "war criminals," rather than common criminals.

> [The] confusion between politically motivated violence and normal criminality is not only illogical, but also unnecessary to defend the political order. Even accepting the law of war as applicable to the lowest levels of political violence, the leaders and soldiers who commit "grave breaches". . . can legally be subject to condign punishment regardless of their status or lack of status as prisoners of war.138

The Nuremberg Trials, following World War II, produced a list of war crimes which were prosecuted after the war by an international tribunal:

> Violations of the laws or customs of war which include, but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.139

According to Common Articles of the Geneva Conventions of 1949,140 grave breaches are generally crimes committed against "protected persons" - the sick, wounded, prisoners of war, and civilians under the protection of the occupying power. These include willful killing, torture, willfully causing serious injury, and looting, among other unenumerated crimes.141 The Protocols of 1977 extended this

protection to all civilians and enumerated specific crimes in Article 85.142

B. USE OF THE UCMJ

All of these crimes may be tried, under the provisions of Article 18, UCMJ, "General courts-martial also may have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war." The Manual for Courts Martial further provides that the General court-martial may be used to supplement the law of an occupied territory, when that law is superceded by the occupying power.143 This provision could be applied in a situation of deployment against terrorists by Presidential proclamation.144 In the alternative, a military tribunal may be appointed, as the provisions of Article 21, UCMJ, indicate.

Although the jurisdiction of the military tribunal or court-martial is not in dispute, the wisdom of using this method to try terrorists who violate the laws of war during an undeclared war against terrorists may be questioned. Military courts have the responsibility of resolving disputes involving the laws of war. As Ex parte Quirin (discussed above in the context of an Article 5 Tribunal) indicates:

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to impede our military effort, have violated the laws of war.145

Where is there better expertise to try terrorists for violating the laws of war? Since both Article 82 of the Protocol I and Army Regulations require that the military attorney remain well-versed in the laws of war, the trial can be carried out expeditiously, with minimum delay, and less notoriety than would be occasioned by a protracted trial in federal court.146

In many cases, due to the types of terrorist tactics described above, the law will place members of terrorist forces in an ambiguous category of combatants called "underprivileged combatants," devoid of the3 protections afforded prisoners of war.147 As discussed above, for example, if captured terrorists failed to properly identify themselves as "lawful combatants" they are subject to a "special regime, analogous to municipal law, " but enforced by military tribunal.148 In Ex parte Quirin the accused were eight German saboteurs who had infiltrated by sea and discarded their uniforms upon entry into the United States. The Supreme Court held that these "unlawful combatants are likewise subject to capture and detention, but in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."149

C. SUBSEQUENT RELEASE AND REPATRIATION

The other issue which stands out when applying prisoner of war status to terrorists is the issue of repatriation. Article 118 of the Prisoner of War Convention provides that "[p]risoners of war will be

released and repatriated without delay after the cessation of active hostilities."150 Pictet notes that "the internment of captives [in time of war] is justified by a legitimate concern - to prevent military personnel from taking up arms once more against the captor state."151

On a practical level, the rules of Article 118, and the justification expressed in Pictet's commentary, offer advantages for the government to apply the law of war to terrorists who are captured in counter-terrorist military operations. The captured terrorist can be treated as a prisoner of war without trial, and he can be detained until the war is over.

It is in the application that this provision is much more difficult, however. The Israelis have taken to swapping individuals who have been administratively detained or actually convicted of being members of terrorist groups for captured Israeli soldiers or hostages. Under Israeli law, the detainees could conceivably be held forever, as long as they are a threat to the security of the state.152 "Given the tenacity of some clandestine forces this detention could last longer than the sentence he would receive under criminal law."153 Given the interminable nature of protracted terrorist warfare it is almost impossible to determine when the "hostilities" of a particular terrorist group terminate.

Given the right circumstances, however, the application of prisoner of war status and eventual repatriation could be feasible. Certainly with regard to large terrorist organizations, like the PLO, or in areas of constant turmoil, like Lebanon, having several

terrorist prisoners of war to trade for American prisoners or hostages would be to the advantage of the United States.154 Exchange could be easier to arrange, and more politically acceptable if the captured "terrorists" are more appropriately characterized as prisoners of war.

X. ALTERNATIVES TO POW STATUS

A. JURISDICTION CEDED TO LOCAL AUTHORITIES

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)

In the sphere of international relations, the preferred solution to the problem of obtaining justice for terrorist acts is to cede jurisdiction over such acts to the country where U.S. armed forces are operating. Both domestic case law and international law treatises recognize that sovereignty is a bedrock concept of international law: "A State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission."155 The state where U.S. military action takes place to rescue Americans or subdue terrorists is then primarily

responsible for adjudication of the case against terrorists for acts committed within its borders.

In practice, however, the cession of jurisdiction to the host country may not ensure that justice is done. Even the staunchly anti-terrorist Italians, who rescued General Dozier and attacked the Red Brigade terrorists in a concentrated national campaign, refused to take any action against Mohammed Abul Abbas for his actions in planning and executing the Achille Lauro hijacking, even after the Italian authorities were provided with extensive proof of his complicity.156 The Italian officials admitted that their inaction was designed to avoid spoiling relations with the Arab world. U.S. government officials pointed out that "it is virtually impossible to persuade sovereign nations to take actions which cut across their political and diplomatic interests."157 And these problems are compounded in third-world countries which have a tenuous, or non-existent, hold on their justice system, or countries which are unfriendly to the United States.158

Once the sovereign with which the U.S. government is negotiating has decided to prosecute or not prosecute the offending terrorist, extradition is widely discussed as an alternative method of obtaining criminal jurisdiction over terrorists.159 But just obtaining extradition, as a political matter, is equally as difficult as persuading the country to prosecute the offender itself. In the Abbas case both the Italian and Yugoslav governments refused to extradite the terrorist ringleader, despite the existance of extradition treaties.160 Most recently,

our staunch German allies have balked at extraditing the perpetrator of the Berlin disco bombing, for fear that terrorists in Lebanon will execute or fail to release German nationals kidnapped after the apprehension of the terrorist.161

Policy considerations can be a substantial bar to extradition of terrorists. Even where a treaty exists and diplomatic relations are active between the parties, extradition may be denied on the ostensible grounds that the charge against the accused is political in nature,162 or that the formalities of extradition have not been met, or that the accused is being tried in the requested state, where the "real grounds for the denial of extradition may lie in the Byzantine permutations of daily relations between the requesting and requested states, as well as the relations between the requested state and other countries with which it desires to be on cordial terms."163 The problem with extradition is the reluctance of countries to apply the law to a given case, rather than the legal concept itself.164

B. UNIVERSAL CRIMINAL JURISDICTION

Another widely discussed alternative to prisoner of war status is the creation of a crime of universal jurisdiction to combat terrorism.165 Under a theory of universal jurisdiction the terrorist would be defined as a hostis humanis generis, an enemy against the human race, who, like pirates, would be "considered the enemy of every state, and can be brought to justice anywhere."166 Terrorism, like piracy on the high seas,

represents anarchy in society. The terrorist's lack of respect for international norms of conduct makes the repression of terrorism a responsibility of civilized mankind.

But the norms of conduct are not universally agreed upon, and the political dimension of terrorism has made it impossible to attain "universal" agreement on the definition of the crime or the application to specific political groups. As early as 1937 the Convention fo the Prevention and Punishment of Terrorism defined terrorism broadly to include criminal acts against a state and intended to create a state of terror in the minds of particular persons or the general public; "this proved conceptually satisfying but practically inefficacious. . ."167

The Draft Convention for the Prevention of Certain Acts of International Terrorism, submitted by the U.S. delegation to the United Nations on 25 September 1972, three weeks after the Munich massacre, proscribed "unlawful killing, serious bodily harm, or kidnapping . . . intended to damage the interests of or obtain concessions from a state or an international organization."168 In response, however, the General Assembly approved Resolution 3034, which expressed "deep concern over increasing acts of violence," but reaffirmed the "legitimacy of the struggle" for self-determination, and focused its primary attention on "finding just and peaceful solutions to the underlying causes which gave rise to such acts of violence." This resolution "could arguably be construed as a condonation, rather than a condemnation of terrorism."169

To attain international cooperation, "terrorist actions must be defined, not in broad political terms, but rather in terms of specific mutual interest."170 The only international agreement regarding terrorism has come in a few select areas where most nations can find some common interests - airline hijacking, and crimes against diplomatic personnel.

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)171 and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention)172 proscribed hijacking of aircraft and mandated extradition for terrorists by all signatories. The Hague Convention, in Articles 2 and 4, and the Montreal Convention, in Articles 3, 5, and 10, place the obligation on the parties to provide the necessary legislation to carry out their obligations under the conventions. Only a third of the countries who were signatories in 1978 had provided implementing legislation, and up to one fourth of the hijackers who have been apprehended have avoided prosecution in countries that have not carried out their obligations under the conventions.173

The United Nations and the Organization of American States have each passed a Convention to Prevent and Punish Acts of Terrorism Against Internationally Protected Persons.174 An "internationally protected person" is narrowly defined as a head of state, a representative or official of the state, and an agent of international organizations, as well as members of their household.175 Under both conventions the scope of the duty of parties with

respect to an offender they may apprehend is solely to submit the acccused to the appropriate authorities for disposition.176

Most countries provide in their penal codes that attacks or attempted attacks against diplomats will be subject to "severe criminal penalties."177 However, the conventions impose "no limitations whatsoever on prosecutorial discretion as to whether to bring the accused to trial."178 Like the aircraft hijacking conventions, these traties fail to obtain justice for terrorist actions in many cases, due to application of the "political offense exception" to extradition, a confusion over whether diplomatic agents are "recognized" as such by the receiving state, and other "considerations of political expediency clothed in legal terms."179

As these two cases illustrate, international attempts to proscribe terrorist acts have generally met insurmountable obstacles of "political expediency," even in these narrow areas where the vested interests of all nations would appear to rest. In the war against terrorism only unilateral action may provide the means for the U.S. government to punish acts of terrorism perpetrated against its citizens.

C. U.S. CRIMINAL JURISDICTION

On 27 August 1986 the U.S. Congress passed legislation which gives the government extraterritorial jurisdiction over killing and all physical violence directed against a national of the United States, when such acts are "intended to coerce, intimidate, or

retaliate against a government or civilian population."180 This legislation gives the U.S. government the ability to prosecute virtually all terrorists who are apprehended for terrorist acts against U.S. citizens, anywhere in the world. It signifigantly increases the criminal law capabilities to deal with terrorism, along with legislation and treaties to limit the use of the "political offense exception."181

Unfortunately, this legislation is hampered by many of the same problems associated with ceding jurisdiction to a foreign country, extradition, and universal jurisdiction over terrorist acts - prosecutiion often depends upon the U.S. government's ability to take and hold the terrorist, or obtain his extradition. Once a terrorist has been seized during a military deployment overseas, however, the exercise of the jurisdiction provided by 18 USC 2331 is assured, as long as the international political ramifications of essentially exercising U.S. jurisdiction in a foreign country can be made tolerable.

XI. CONCLUSION

A. CURRENT WISDOM

The current wisdom suggests that the law of war should not be applied to terrorists, and they should not be given any sort of recognition as prisoners of war, entitled to the "belligerent privilege." Professor Denise Bindschedler-Robert, moderator of a discussion on the law of armed conflicts sponsored by

the Carnegie Endowment for Peace in 1970, disputed the need to give any heightened recognition to the status of terrorists or guerrillas:

> this argument has no value, because at the early stage, when there is not yet any armed conflict, the law of armed conflicts does not apply; it is thus unnecessary to discuss the conditions for acquiring the privileged status of lawful combatants. At a later stage, when there is an armed conflict, terrorism runs counter to the law.182

But the Attorney General, Edwin Meese, acknowledged in a speech to the ABA Terrorism Symposium, in April 1985, that the fight against terrorism must be framed in terms of both the law of war, and domestic law, "Whether criminal act or warfare, we must not sacrifice the rule of law."183

B. GOAL TO ENCOURAGE CONDUCT WITHIN THE LAW OF WAR

It is precisely because terrorism "runs counter to the law" that the United States government should consider applying the law of war regarding the "belligerent privilege" during military actions taken against terrorists. The intitial employment of prisoner of war status and the later orderly determination of such a status will serve to encourage terrorist conduct within the bounds of the law of war.

Once military force is deployed in a foreign country to conduct counter-terrorist operations an international armed conflict exists. It is absurd to attempt to apply a domestic law regime to the deployment of armed forces abroad.

Humanitarian law is also aspirational in nature. It is in the best interest of the Unites States to encourage behaviour in compliance with the laws of war. And if the terrorist forces insist on violating those laws, after we have placed them on notice of our intention to treat them honorably within the bounds of the law of war, they should be prosecuted unmercifully, in accordance with that same law of war regime.

Application of the law of "belligerent privilege will further the goals announced by Secretary of State George Schultz, when he discussed the "challenge" of ambiguous warfare on 15 January 1986:

> The armed ideologies of the world may believe that our devotion to international law will immobilize us abroad, just as they may believe our political system will immobilize us at home . . . we will not permit our enemies - who despise the rule of law as a "bourgeois" notion - to use our devotion to law and morality as a weapon against us. When the United States defends its citizens abroad or helps its friends and allies defend themselves against subversion and tyranny, we are not suspending our legal and moral priniciples. On the contrary, we are strengthening the basis of international stability, justice, and the rule of law.184

C. POLICY DETERMINATION

As a matter of U.S. policy all suspected terrorists should initially be accorded the privileges of prisoner of war status. After capture, using the structure developed under international law, the terrorist and his organization should be carefully examined to determine if he can be afforded

"belligerent status," with the concommitant privileges of prisoner of war status. U.S. policy should also seek to liberally apply the criteria for combatant status, in order to encourage conduct by "terrorists" which is in conformity with the laws of war. Those who do not obtain combatant status can be treated as common criminals, under the new domestic law, applying extraterritorial jurisdiction.

Any U.S. policy toward captured terrorists should contain three goals:

1. Ease of application for the deployed soldier.

2. Application of the humanitarian aspects of the law of war, whenever possible.

3. Punishment of terrorist acts which do not conform to the laws of war.

These goals are best achieved by a judicious mixture of the law of war, applied to what is clearly an "armed conflict" (in any common-sense application of the term), and domestic law, when the terrorist has failed to follow any civilized norms of conduct.

NOTES

1. Alexander, The Terrorism Problem, 8 TERR. & INT'L L. J. 272, 273 (1986).

2. Hoffman, Terrorism in the United States in 1985, RAND PAPER SERIES (Feb. 1986), at 3.

3. Jenkins, Testimony Before the Committee on the Judiciary, RAND PAPER SERIES (Feb. 1984), at 5.

4. Jenkins, New Modes of Conflict, RAND PAPER SERIES (June 1983), at 8.

5. Id. at 9.

6. Id. at vi.

7. Jenkins, The Lessons of Beirut: Testimony before the Long Commission, RAND PAPER SERIES (Feb. 1984), at 3.

8. Jenkins, Combatting Terrorism Becomes A War, RAND PAPER SERIES (May 1984), at 2. (Jenkins, a leading expert on terrorism, analyzes the effect of the October 23rd bombing and the policy responses which resulted from the administrtation's frustration with the inability to define specific targets.)

9. Id.

10. R. McFarlane, "Terrorism and the Future of Free Society," Speech delivered at the National Strategic Information Center, Defense Strategy Forum, Washington, D.C., 25 March 1985. Quoted in J. Terry, An Appraisal of Lawful Military Response to State-Sponsored Terrorism, 39 NAVAL C. REV. 59 (1986). See also Wash. Post, 16 April 1984, at 19.

11. R. Reagan, The New Network of Terrorist States, 721 U.S. DEP'T OF ST. BUREAU OF PUB. AFF. CURRENT POL'Y BULL. 3 (1985).

12. G. Schultz, Low Intensity Warfare: The Challenge of Ambiguity, 783 U.S. DEP'T OF ST. BUREAU OF PUB. AFF. CURRENT POL'Y BULL. 4.

13. Id. at 3.

14. Id.

15. See ABA Terrorism Symposium, infra, note 24. See also Evans, infra, note 22, and Bassiouni, infra, note 81.

16. See 18 USC 2331, Omninbus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 9 USCS 2477 (1986).

17. The moral reality of warfare is divided into two seperate parts: the reasons for using force, or precipitating combat; and the manner in which the war is being fought. Medieval writers discussed the proposition in terms of a difference in prepositions, distinguishing "jus ad bellum," the justice of war, from "jus in bello", justice in war. For a complete discussion of the moral issues, and some of the legal aspects of this subject see M. Walzer, Just and Unjust Wars (1977).

18. Yassir Arafat has been quoted as saying before the United Nations that noone is a terrorist who "stands for a just cause," quoted in Jenkins, International Terrorism: The Other World War, Project Air Force Study, RAND PAPER SERIES (Nov. 1985), at 2.

19. Report of the Secretary-General, U.N. Doc. A/C.6/418 at 41, quoted in Paust, Terrorism and the International Law of War, 64 MIL. L. REV. 1, 26 (1979).

20. Radio Marti Broadcast, JOINT PUBLICATIONS RESEARCH SERVICE(JPRS) REP., Vol. TTP, No. 16, at 61 (20 May 1985). See also Moscow Television Service Broadcast, JPRS REP., Vol. UMA, No. 44, at 62 (23 June 1985).

21. M. Veuthey, Guerilla et Droit Humanitaire 18 (1976), quoted in F. Kalshoven, Guerrilla and Terrorism, 33 AMER. U. L. REV. 67, 71 (1983).

22. Legal Aspects of International Terrorism, xv (A. Evans ed., 1978). [hereinafter cited as Evans].

23. Arechaga, Anuario Uruguayo de Derecho International, 1962, quoted in Inter-American Juridical Committee, "Statement of Reasons for the Draft Convention on Terrorism and Kidnapping," 5 October 1970, O.A.S. Document CP/doc. 54/70, rev. 1, 4 November 1970.

24. Benjamin Netanyahu, "Speech to the American Bar Association National Security Subcommittee Symposium on Terrorism," [hereinafter cited as ABA Terrorism Symposium], April 1986, moderated by Professor John Norton Moore (video tape available from the University of Virginia Center for Law and National Security). See also Netanyahu, Terrorism: How the West Can Win (1986), at 9. [hereinafter cited as Netanyahu]

25. Irving Kaufman, "Speech to ABA Terrorism Symposium." This definition is very close to the definition adopted by Judge Harlington Wood, Jr., in Eain v. Wilkes, 641 F. 2d 504(7th Cir. 1981), to define the defendant, Abu Eain's, conduct as "terrorist activity," outside the scope of the "political offense exception." Id. at 521.

26. Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, Article 4A(2)(b),(c), T.I.A.S. No. 2863, quoted in Dep't of the Army Pamphlet No. 27-1, Treaties Governing Land Warfare, 69 (Dec. 1956) [hereinafter cited as Article 4A(2)(b),(c), GPW]. See discussion of this issue below, regarding the requirement for terrorists to properly identify themselves to attain POW status and avoid trial for war crimes.

27. "Rules of Engagement" is a term of art, referring to directives issued by competent superior authority, which delineate the circumstances and limitations under which U.S. forces will initiate and/or continue engagement with other forces. See Appendix C, 8, Joint Operations Planning System(JOPS) Operations Order format.

28. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949, Article 2, T.I.A.S. No. 3362, quoted in Dep't of the Army Pamphlet No. 27-1, Treaties Governing Land Warfare, 24 (Dec. 1956) [hereinafter cited as Article 2, GWS]. See also

Article 2, GPW and Geneva Convention Relative to the Treatment of Protection of Civilian Persons in Time of War, 12 Aug. 1949, Article 2, T.I.A.S. No. 3365, quoted in Dep't of the Army Pamphlet No. 27-1, Treaties Governing Land Warfare, 135(Dec. 1956) [hereinafter cited as Article 2, GC].

29. Dep't of the Army Pamphlet No. 27-161-2, International Law, Vol. II, 36 (Oct. 1962). See also Hague Convention III Relative to the Opening of Hostilities, 18 Oct. 1907, Article 1, 36 Stat. 2259, quoted in Dep't of the Army Pamphlet No. 27-1, Treaties Governing Land Warfare, 2 (Dec. 1956).

30. R. Reagan, supra, note 11, at 3.

31. L. Oppenheim, International Law, Volume II: Disputes, War and Neutrality, at 295 (Lauterpacht 7th ed. 1969) [hereinafter cited as Lauterpacht].

32. G. A. Res. 3314(XXIX), Definition of Aggression, Article 3(g), quoted in Air Force Pamphlet No. 110-20, Selected International Agreements, 5-79 (July 1981) [hereinafter cited as AF Pam 110-20]. See also U.N. CHARTER, Article 51, quoted in AF Pam 110-20, 5-8 (permits the use of force in self-defense "if an armed attack occurs against a Member state. . ."). Any further discussion of the justification for the Libyan raid under international law is beyond the scope of this paper. It is just offered as an illustration of deployment of armed force against state-sponsored terrorism.

33. Lauterpacht, at 203.

34. G. A. Res. 3314(XXIX), supra, note 32. See also Lauterpacht, at 298-99. The law of neutrality can also be applied to justify armed action against the harboring state (and thus apply the Geneva Convention to its armed forces and all of its citizens, including terrorists), since "if the neutral fails to prevent unlawful belligerent use of its territory the opposing belligerent can permissably conduct proportionate combat operations in the neutral's territory to terminate the unlawful belligerent activity." Williams, Neutrality in Modern Armed Conflicts: Summary of the Developing Law, 90 MIL. L. REV. 9, 46 (1980).

35. Williams, supra, note 34. See also Pictet, Commentary, IV, The International Committee of the Red Cross, at 20 (Geneva 1960) [hereinafter cited as Pictet, Commentary IV].

36. Since U.S. forces are being deployed to another country in the scenario being discussed in this paper, it can also be distinguished from "an armed conflict not of an international character," since that was contemplated by the drafters as a wholly internal affair. See Pictet, Commentary III, The International Committee of the Red Cross, at 31-37 (Geneva 1960) [hereinafter cited as Pictet, Commentary III].

37. While Lauterpacht clearly defines a war as something more than action against insurgents or pirates (and, by analogy, terrorists), and the British and American views at the discussions over the applicability of the term "armed conflict" in Article 1 of Protocol I indicate that it applies to a higher level of violence ["The term 'armed conflict' applies to a level of violence of much more intensity than riots, isolated acts of violence, or fighting by a group which does not control a sufficient amount of territory to conduct sustained operations {belligerency/insurgency distinction}. . . A reasonable interpretation of Article 1, paragraph 4 {of Protocol I} will, in accordance with its negotiating history, have to be interpreted narrowly . . . {to} exclude violence of terrorist activity from the category of 'armed conflicts.' Hansell, Request for Authorization to Sign Two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War, ST. DEP'T CIRCULAR 175 (11 Oct. 1977), at I-1-20 [hereinafter cited as Circular 175]], Pictet eschews any description of the level of violence necessary to describe an "armed conflict" [Pictet, Commentary III, at 23].

38. Pictet, Commentary IV, at 21.

39. Circular 175, at I-1-25.

40. Article 5, GPW.

41. 99 nations attended the conference in Geneva to prepare and sign the accords. They were adopted by a vote of 78-1, with 18 abstentions, with votes by several national liberation movements in favor of the

protocols counted seperately. By late 1985, 55 nations had ratified the protocols. Nissim Bar-Yaacov, Some Aspects of Prisoner of War Status, According to the Geneva Protocols of 1977, 20 ISRAELI L. REV. 243, 245 (1985). U.S. ratification is highly unlikely at any time in the near future. See Wash. Post, 23 July 1985, at 12. The Protocols can be considered as "evidence" of customary international law, even though their binding effect on countries who have not ratified it is in serious question. See M. Bothe, K.J. Partsch, and W.A. Solf, New Rules of Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (1982) [hereinafter cited as Bothe].

42. Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Article 45a, Vol. XVI, INT'L LEGAL MATERIALS 1391 (1977), quoted in Dep't of the Army Pamphlet No. 27-1-1, (Sep. 1979) [hereinafter cited as Protocol I].

43. For discussion of the "rebuttable presumption" see H. Levie, Prisoners of War in International Armed Conflict, 59 U.S. NAVAL WAR C. INT'L L. STUD. 56, note 202 (1977) [hereinafter cited as Levie].

44. Dep't of the Army Field Manual No. 27-10, The Law of Land Warfare, 30 (July, 1956) [hereinafter cited as FM 27-10].

45. Dep't of Army, Reg. No. 190-8, Enemy Prisoners of War Administration, Employment, and Compensation, para. 1-5a(1) (2 December 1985).

46. Dep't of the Army Memorandum, DAJA-IA 1983/7031, 4 Nov. 1983, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY.

47. Id.

48. Id.

49. Military Prosecutor v. Omar Mahmud Kassem and Others, 1 S.J.M.C. 402 (April 1969), printed in ISRAELI Y.B. ON HUM. RTS. 458 (1971).

50. Pictet, Commentary III, at 73.

51. Id. at 73-77.

52. Lauterpacht, at 368, 370.

53. Surbank, Dissemination of International Humanitarian Law, 33 AM. U. L. REV. 125, 126 (1983).

54. Pictet, Commentary III, at 77.

55. Id.

56. Military Prosecutor v. Kassem, 1 S.J.M.C. at 457.

57. Levie, at 56.

58. US v. Morales, 464 F. Supp 325, 326 (E.D.N.Y. 1979).

59. Ex parte Quirin, 317 US 1, 27 (1942). See also In re Yamashita, 327 US 1, 11 (1945). Article 12 was the precursor to Article 18, Uniform Code of Military Justice(UCMJ), which provides that a "General Court Martial also may have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal . . ." Uniform Code of Military Justice, art. 18, 10 U.S.C. 818 (1984) [hereinafter cited as UCMJ].

60. Levie, at 56, n203 ("It is clear that the term 'competent tribunal' was not intended to limit jurisdiction to make the decision to the 'regular' courts (2A Final Record 563). Conversely, there is no reason to believe that a regular civilian court would not constitute a 'competent tribunal.'").

61. FM 27-10, at 30.

62. Levie, at 57.

63. Id.

64. Directive No. 381-46 of December 27, 1967, Military Assistance Advisory Command, Vietnam (MACV), printed in 62 AM. J. OF INT'L L. 765, 775 [hereinafter cited as MACV Directive].

65. See generally Dep't Army, Reg. No. 15-6, Procedures for Investigating Officers and Boards of Officers, (15 June 1981).

66. MACV Directive, at 769.

67. Pictet, Commentary III, at 77.

68. W. Solf, The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnatinal Practice, 33 AM. U. L. REV. 53, 58 (1983) [hereinafter cited as Solf].

69. W. Winthrop, Military Law and Precedents (1896), at 778.

70. U.S. Dep't of War, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, (24 April 1863), compiled in Levie, Vol. 60, at 39 [hereinafter cited as the Lieber Code].

71. Winthrop, supra, note 69, at 778.

72. Pictet, Commentary III, at 46.

73. Id.

74. Article 4, GPW.

75. Levie, at 34.

76. Nissim Bar-Yaacov, supra, note 41, at 251.

77. See Levie, at 40. But see Pictet, Commentary III, at 58. (Pictet says that this implied requirement insures that the resistance movement have a military organization, with the principal characteristics of armed forces throughout the world, "particularly in regard to discipline, hierarchy, responsibility and honour.")

78. Id. at 42. See also Pictet, Commentary III, at 57.

79. Military Prosecutor v. Kassem, 1 S.J.M.C. at 458.

80. Lt. Col Y. Zinger, Peace for Galilee: The Prisoners, 2 IDF J. 37-38 (1982), quoted in Nissim Bar-Yaacov, supra, note 41, at 252, note 19.

81. Y. Dinstein, Terrorism and War of Liberation: An Israeli Perspective of the Arab-Israeli Conflict, in Bassiouni, at 163.

82. See W.T. Mallison, Jr. and S.V. Mallison, An International Law Appraisal of the Juridical Characteristics of the Resistance of the People of Palestine: The Struggle for Human Rights, in Bassiouni, at 173. (The Mallisons dismiss the claims that the PLO fighters fail to meet the four explicit criteria of the organized resistance movements with a factual dispute over "command," wearing a "distinctive insignia," and the requirement to "carry arms openly.")

83. Id. at 174.

84. Pictet, Commentary III, at 57.

85. Protocol I, Article 1.

80. Lauterpacht, at 249. On the specific applicability to the PLO See Mallison, supra, note 82. See also Rodes, On Clandestine Warfare, 39 WASH. & LEE L. REV. 333 (1983).

87. Quoted in Levie, at 45, note 166.

88. R. Baxter, The Geneva Conventions of 1949 and Warws of National Liberation, in Bassiouni, at 130.

89. Protocol I, Article 44.

90. See Circular 175, at I-44-8. See also Baxter, supra, note 88, at 131.

91. Pictet, Commentary III, at 52.

92. Baxter, supra, note 88, at 131.

93. It is fairly well settled that the group, and the individual, have no combatant status if the group, as a whole, fails to satisfy the criteria for an armed resistance group, even if the indivdual satisfies the

criteria individually. See Levie, at 40, 44. However, there is some dispute among legal scholars whether "an individual member of a lawful armed group must in his conduct comply with each of the conditions in order to be entitled to prisoner-of-war status." Nissim Bar-Yaacov, supra, note 41, at 252. Compare G. Draper, The Status of Combatants and the Question of Guerrilla Warfare, 45 BR. Y.B. OF INT'L L. 196, 197 (1971) with Levie, at 44-45, note 165, and R. Baxter, The So-Called 'Under privileged Belligerency': Spies, Guerrillas, and Sabateurs, 28 BR. Y.B. OF INT'L L. 323 (1951).

94. Pictet, Commentary III, at 57. The connection between the Soviet Union and terrorist groups has been established in numerous publications. See Alexander, The Terrorism Problem, 8 TERR & INT'L L. J. 272 (1986). See also Claire Sterling, The Terror Network (1983) and Netanyahu.

95. Claire Sterling, "Unraveling the Riddle," in Netanyhahu, at 103.

96. Pictet, Commentary III, at 58.

97. Lauterpacht, at 249. See also note 80.

98. Rodes, supra, note 86, at 337.

99. Id.

100. Bothe, at 40.

101. See Circular 175, at I-1-6, and GPW, Article 2. See also Solf, at 59.

102. Circular 175, at I-1-19.

103. See discussion in Bothe, at 42,52.

104. Id.

105. SWAPO is the South West African People's Organization in Namibia, ANC is the African National Congress in South Africa, and the PLO is the Palestine Liberation Organization, discussed previously.

106. Protocol I, Article 43.

107. Pictet, Commentary III, at 58.

108. Protocol I, Article 43.

109. Bothe, at 236.

110. Id. at 237.

111. Wash. Post, 4 March 1987, at 1.

112. Jenkins, International Terrorism, the Other World War, supra, note 18, at 3. See also Konrad Kellen, Terrorists--What Are They Like? How Some Terrorists Describe Their World and Actions, RAND PAPER SERIES (Nov. 1979), at 45-50. There was a great deal of skepticism regarding Yassir Arafat's offer to prosecute Abu Abbas' terrorists, who hijacked the Achille Lauro. See Bruce Hoffman, The Aftermath of the Achille Lauro, RAND PAPER SERIES, (Nov. 1985), at 2.

113. See Center for Land Warfare, United States Army War College, Theater Planning and Operations for Low Intensity Conflict Environments, (September, 1986), at 4.

114. Kellen, On Terrorists and Terrorism, RAND PAPER SERIES (Nov. 1982), at 57.

115. Id. at 15.

116. Article 82, Lieber Code.

117. Rodes, supra, note 86, at 345.

118. Baxter, supra, note 93, at 328.

119. Paust, Law in a Guerrilla Conflict: myths, Norms and Human Rights, 3 ISRAELI Y.B. ON HUM. RTS. 39, 73 (1973).

120. Levie, at 46-47. (Levie offers a particularly concise quote from Madame Bindschelder-Robert, to explain the last requirement: "They may try to become invisible in the landscape, but not in the crowd." Id. at note 174.)

121. Levie, at 49.

122. Pictet, Commentary III, at 61.

123. D. Bindschedler-Robert, A Reconsideration of the Law of Armed Conflict: Report of the Conference on Contemporary Problems of the Law of Armed Conflicts (1971), at 42.

124. Levie, at 51.

125. Military Prosecutor v. Kassem, 11 S.J.M.C. at 460.

126. Draper, quoted in D. Bindschedler-Robert, supra, note 123, at 83.

127. A. Rubin, Terrorism and the Laws of War, 12 DEN. J. OF INT'L L. & POL'Y 219, 225 (1983).

128. Id. at 229.

129. GPW, Article 4 A(2)(d).

130. Solf, at 59.

131. Rodes, supra, note 86, at 344.

132. Spillane, Terrorists and Special Status: The British Experience in Northern Ireland, 9 HASTINGS INT'L & COMP. L. REV. 481, 488 (1986).

133. REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND, No. 5847 (1975) (Lord Gardiner, Chairman), at 105, quoted in id.

134. Spillane, supra, note 132, at 489.

135. Based on the European Convention on Human Rights, Ireland protested the subsequent treatment of IRA members in McFeeley v. United Kingdom, 3 E.H.RR. 161, L980 Y.B. EUR. CONV. ON HUM. RTS. 256 (Eur. Comm'n on Hum. Rts.).

136. Id.

137. Protocol I, Article 4. This provision was only included in common Article 3 of the four Geneva Conventions.

138. Rubin, supra, note 127, at 231.

139. R. Falk, G. Kalko, R. Lifton, ed., Crimes of War (1971), at 108.

140. GSW, Art. 50; GPW, Art. 130; GC, Art. 147; para. 502, FM 27-20.

141. GWS, Article 51.

142. Protocol I, Article 85(3&4).

143. Manual for Courts-Martial, United States, 1984, Rule for Court Martial RCM 201(f)(1)(B)(i)(b).

144. Ex parte Quirin, 317 U.S. at 27.

145. Ex parte Quirin, 317 U.S. at 29.

146. Army Regulations requires that periodic training in the laws of war be conducted. Dep't Army, Reg. No. 350-212, Military Justice Training, para. 6 (28 May 1985).

147. Rodes, supra, note 80, at 339.

148. Baxter, The So-Called Underprivileged Belligerency: Spies, Guerrillas, and Saboteurs, 28 BR. Y.B. OF INT'L L. 323, 328 (1951).

149. Ex parte Quirin, 317 U.S. at 31.

150. GPW, Article 118.

151. Pictet, Commentary III, at 547.

152. See Dershowitz, Preventive Detention of Citizens During a National Emergency - A Comparison Between Israel and the United States, 1 ISRAELI Y.B. ON HUM. RTS. 295 (1971).

153. Rodes, supra, note 86, at 338.

154. This comment is not intended to suggest that the U.S. government should consider such a swap in response to terrorist demands in a hostage situation. But prisoner exchanges, per se, may be beneficial for U.S. policy.

155. Lauterpacht ed., Oppenheim's International Law, Vol. I, (8th ed., 1955), at 289. See also DA Pam 27-161-1, at 4-1 through 4-16.

156. N.Y. Times, 13 Oct. 1985, at A1 col. 6.

157. N.Y. Times, 14 Oct. 1985, at A1, col. 3. U.S. soldiers who participated in the interception of the Egyptian airliner must have been disappointed to find that the mastermind of the operation, who they captured in a display of tactical military skill (and considerable risk), was released to Italian authorities, only to be set free.

158. Expecting the government of Lebanon, or even Syria, to obtain justice for the hijacking of TWA flight 847 in 1985 is unrealistic. See Hoffman, Shi'a Terrorism, the Conflict in Lebanon, and the Hijacking of TWA Flight 847, RAND PAPER SERIES (Jul. 1985). See also N.Y. Times, 14 Oct 1985, at A1, col. 3 (U.S. officials had no hope that the Yugoslav government would take any action against Abbas).

159. See Bassiouni, An International Control Scheme for the Prosecution of International Terrorism: An Introduction, in Evans, at 289. See also Vogler, Perspectives on Extradition and Terrorism, in Bassiouni, at 391. Extradition requires that the U.S. first attain criminal jurisdiction, through one of the ways discussed below.

160. See supra, note 158.

161. Wash. Post, 31 Mar. 1987, at A1, col. 4.

162. The "political offense exception" to extradition, recognized by most western countries, protects terrorists when crimes are politically motivated. The U.S. approach to this problem has been to exclude the "political offense exception" from extradition treaties. See Supplementary Treaty concerning the Extradition Treaty Between the U.S. and the U.K., INT'L LEGAL MAT'LS, Vol. XXIV, No. 4, July 1985. See also comments by Victoria Tonsig, ABA Terrorism Symposium. An extensive discussion of this issue is beyond the scope of this paper. See generally Bassiouni, The Political Offense Exception in Extradition Law and Practice, in Bassiouni, at 398.

163. Evans, The Apprehension and Prosecution of Offenders: Some Current Problems, in Evans, at 495.

164. Extradition is further complicated by the virtual sanctuaries which are created for terrorists by the countries which tacitly support their activities. See Kerstetter, Practical Problems of Law Enforcement, in Evans, at 536.

165. See generally Evans and Bassouini.

166. Lauterpacht, at 609. See also Convention on the High Seas, 29 April 1958, Articles 14-19, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, AF Pam 110-20, at 6-59.

167. Murphy, United Nations Proposals on the Control and Repression of Terrorism, in Bassiouni, at 494.

168. Art. 1, Draft Convention for the Prevention of Certain Acts of International Terrorism, UN Doc A/C.6/L.850 (25 Sep. 1972). See also OAS Convention to Prevent and Punish Acts of Terrorism (2 Feb. 1971) OAS/Ser.A/17, OAS/OH Dec. AG/85 rev., reprinted at UNSG Rpt A/C.6/416, Annex V.

169. Murphy, supra, n. 167, at 501.

170. Jenkins, Combatting Terrorism: Some Policy Implications, RAND PAPER SERIES, (Aug. 1981), at 3.

171. 16 Dec. 1970, 22 U.S.T. 1641; T.I.A.S. No. 7192, AF Pam 110-20, at 6-22.

172. 23 Sep. 1971, 24 U.S.T. 564; T.I.A.S. No. 7570, AF Pam 110-20, at 6-26.

173. Evans, Aircraft and Aviation Facilities, in Evans, at 15.

174. See OAS Convention, 2 Feb. 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, DA Pam 110-20, at 5-83 and UN Convention, 14 Dec. 1973, 28 U.S.T.S. 1975, T.I.A.S. No. 8532, DA Pam 110-20, at 5-85.

175. Id. at 5-85. See also Vienna Convention on Diplomatic Relations, 18 April 1961, Article 29, 22U.S.T. 3227, T.I.A.S. No. 7502. 500 U.N.T.S. 95, AF

Pam 110-20, at 7-17. (The person of a diplomatic agent shall be inviolable.)

176. Id., Article 5, at 5-85.

177. Murphy, Protected Persons and Diplomatic Facilities, in Evans, at 282.

178. Id. at 299.

179. Id. at 302.

180. 18 U.S.C. 2331(a),(c),(e), supra, note 16. It is ironic that the U.S. has adopted the "passive personality principle" of extraterritorial jurisdiction to apply against terrorist acts, in general, since the previous U.S. position was that extraterritorial application of law is an imposition on the sovereignty of the country where the crime takes place. See para. 4-9b, DA Pam 27-161-1, at 4-19. See also Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 MICH. L. REV. 1087, 1088 (1974).

181. Meese, "Speech to the ABA Terrorism Symposium."

182. D. Bindschedler-Robert, supra, note 123, at 27.

183. Meese, "Speech to the ABA Terrorism Symposium."

184. Schultz, supra, note 12, at 3.